IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-773-2021**
	:	
vs.	:	
	:	**CRIMINAL DIVISION**
CARLOS ACOSTA,	:	
Defendant	:	

OPINION

This matter is before the Court on Defendant's Omnibus Pretrial Motion filed August 31, 2021.[1] For the reasons set forth below, the Motion is granted.

I. Introduction

Defendant's Omnibus Motion is based on the prohibition against double jeopardy as set forth in both the United States and Pennsylvania Constitutions. Here, the Commonwealth filed two separate sets of charges against Defendant at separate times – one set at docket 542-2021 and one set at the instant docket, 773-2021. The charges in the instant case were brought after the former prosecution was disposed of by guilty plea. The facts supporting each set of charges arose on the same date, and the charges in case 542-2021 would not have been brought but for the facts supporting case 773-2021.

II. Factual and Procedural Background

The following facts are taken from the Affidavits of Probable Cause in both cases 542-2021 and 773-2021:

[1] Pursuant to an Order granting Defendant's Motion for Extension of Time to File Omnibus Pre-Trial Motion, Defendant's deadline to file was extended to September 3, 2021.

***773-2021*:**

On January 19, 2021, members of the Lycoming County Narcotics Enforcement Unit [hereinafter "NEU"] conducted a controlled purchase of crack cocaine from Defendant and another individual using a Confidential Informant [hereinafter "CI"]. As the CI was walking toward the predetermined buy location, Defendant was observed driving a black Mercedes sedan at which time he parked and exited the vehicle to meet with the CI. Defendant returned to the vehicle's passenger side window where the passenger handed something to Defendant. The Defendant and the CI entered an apartment where the prerecorded police funds were exchanged for crack cocaine. Upon leaving the apartment, the CI returned to the police vehicle to provide the drugs to NEU members, and Defendant reentered the Mercedes and drove away.

542-2021:

At approximately 1:00 p.m. on January 19, 2021, Trooper Jacobs Pennsylvania State Police [hereinafter "PSP"] "located" a black Mercedes Benz, the driver of which committed a minor traffic violation. Trooper Jacobs pulled the vehicle over and, as he was conducting the traffic stop, "immediately observed the odor of raw marijuana emitting from the vehicle." Defendant was identified as the driver of the vehicle and another individual was in the passenger seat. Defendant admitted to smoking marijuana and acknowledged the traffic violation. A K-9 unit was requested and the K-9 had a positive alert on the passenger side exterior door at which time the vehicle was seized, a search warrant was obtained, and numerous baggies containing crack cocaine consistent with distribution were located inside the vehicle along with other illegal items.

On May 7, 2021, Defendant was charged in case 542-2021 with Obedience to Traffic Control Devices,[2] Possession with Intent to Deliver,[3] Possession of a Controlled Substance,[4] Use/Possession of Drug Paraphernalia, and Marijuana-Small Amount.[5] The facts supporting these charges arose from the traffic stop and resulting interactions between Defendant and Trooper Jacobs.

On May 10, 2021, Defendant pled guilty, without legal counsel present, to Possession of a Controlled Substance and, pursuant to the negotiated plea deal, was sentenced to twenty-three (23) days to one year (1) imprisonment. The remaining charges were dismissed.

On July 9, 2021, approximately two (2) months after his plea in case 542-2021, Defendant was charged in case 773-2021 with Delivery of a Controlled Substance[6] and Criminal Use of a Communication Facility.[7] The facts supporting these charges arose from the controlled buy, prior to the Defendant entering his vehicle and driving away.

Defendant now files his Omnibus Pre-Trial Motion, arguing that charges in the case at bar must be dismissed pursuant to the double jeopardy clauses of the United States and Pennsylvania Constitutions[8] and Sections 109 and 110 of the Pennsylvania Crimes Code.[9] A hearing and argument was held November 4, 2021 at which time Detective Michael

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[2] 75 Pa.C.S.A. § 3111(a).
[3] 35 P.S. § 780-113(a)(30).
[4] 35 P.S. §780-113(a)(16).
[5] 35 P.S. § 780-113(a)(31)(i).
[6] 35 P.S. § 780-113(a)(30).
[7] 18 Pa.C.S.A. § 7512(a).
[8] U.S. Const. amend. V; Pa. Const. art. I, § 10.
[9] In his Motion, Defendant cites to Pennsylvania Rules of Criminal Procedure 109 and 110 and in his Brief, cites to Pennsylvania Rules of Civil Procedure 109 and 110. The correct cite is Title 18 of the Pennsylvania Crimes Code at 18 Pa.C.S.A. §§ 109 and 110.

Caschera of the NEU testified as follows:

After Defendant was observed re-entering his vehicle after allegedly delivering cocaine to the CI, Detective Anderson of the NEU tailed the vehicle while another member contacted the PSP to inform them of the facts and Defendant's whereabouts. Because they did not want to disclose the identity of the CI, the NEU instructed the PSP to develop their own probable cause and only pull over Defendant's vehicle and conduct a traffic stop at that point.

Following argument, the Court Ordered that the parties brief the issues and each have done so. This matter is now ripe for decision.

III. Discussion

Defendant relies on the following in support of his Motion:

18 Pa.C.S.A. § 109;

18 Pa.C.S.A. § 110;

Article V of the United States Constitution[10]; and

Article I, Section 10 of the Pennsylvania Constitution.[11]

a. Section 109

Section 109 states in relevant part as follows:

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[10] "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *"
[11] "No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances: . . .

> (3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant.

18 Pa.C.S.A. § 109(3).

There are essentially three elements that must be proven under Section 109: 1) the violations are of the same provision of the statutes; 2) the violations are based on the same facts; and 3) there was a conviction in the former prosecution.

Initially, the Court notes that "[i]n the context of a plea deal, jeopardy does not attach to crimes, which were dropped as part of a guilty plea agreement." *Com. v. Gross*, 232 A.3d 819, 835 (Pa. Super. 2020), *appeal denied*, 242 A.3d 307 (Pa. 2020) (internal citations omitted). Here, in the former prosecution, all counts other than that to which Defendant pled were dismissed by the Commonwealth as part of the plea deal. Therefore, the only statutory provision to which double jeopardy could attach is Section 780-113(a)(16) of the Controlled Substances Act.

In a case where defendant argued that his prior convictions for second and third degree murder precluded his current prosecution for first degree murder under Section 109

because they resulted from a violation of the "same provision." *Com. v. Laird*, 988 A.2d 618, 627 (Pa. 2010). Section 2502(a), (b), and (c) of Crimes Code prohibits first, second, and third degree murder, respectively. 18 Pa.C.S.A. 2502. The Supreme Court, however, held that Section 109(3) refers to the same offense and "not merely the same section of the Crimes Code" and thus, since first, second, and third degree murder are distinct offenses, the Commonwealth was not precluded from retrying defendant for first degree murder. *Id.* at 627-28. *See also*, 18 Pa.C.S.A. §109, official cmt. (the purpose of subsection (3) is in accord with existing law, such that "a former conviction of the accused bars a later prosecution of him for the same offense.").

In the current case, Defendant was charged under Section 780-113(a)(**30**) of the Controlled Substances Act and Section 7512(a) of the Crimes Code. Formerly, he pled guilty to Section 780-113(a)(**16**) of the Controlled Substances Act. Defendant's argument that these two provisions are the same because they are within the same subsection is meritless pursuant to the *Laird* case. Therefore, the current prosecution is not for a violation of the same provision of the statutes as the subsequent prosecution and, at least pursuant to Section 109, the Commonwealth is not prohibited from prosecuting the Defendant under Section 780-113(a)(16) or Section 7512. Since the first elements of Section 109 has not been met, the Court need not address the remaining two.

b. Section 110

Section 110 states in relevant part as follows:

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for the same offense) and the subsequent prosecution is for:

(i) any offense of which the defendant could have been convicted on the first prosecution; [or]

(ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and occurred within the same judicial district as the former prosecution unless the court ordered a separate trial of the charge of such offense . . . .

18 Pa.C.S.A. § 110(1)(i-ii).

In plain terms, Section 110 essentially reads that even if Section 109 does not apply, a subsequent prosecution may still be prohibited if certain elements are met. Generally speaking, in order for Section 110 to bar a subsequent prosecution each prong of the following test must be met:

(1) the former prosecution resulted in an acquittal or conviction;

(2) the current prosecution was based on the same criminal conduct or arose from the same criminal episode;[12]

(3) the prosecutor in the subsequent trial was aware of the charges before the first trial; and

[12] This prong is known as the logical relationship prong.

(4) all charges [are] within the same judicial district as the former prosecution.

Com. v. Reid, 77 A.3d 579, 582 (Pa. 2013).

Regarding the second prong, courts are instructed to "look at the 'temporal' and 'logical' relationship between the charges to determine whether they arose from a 'single criminal episode.'" *Id.*, *citing Com. v. Hude,* 458 A.2d 177, 181 (Pa. 1983). A criminal episode is defined as "an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series." *Com. v. Lee*, 435 A.2d 620, 621 (Pa. Super. 1981). In making this determination, courts must consider whether the offenses present a substantial duplication of issues of fact and law, which "ultimately depends on how and what the Commonwealth must prove in the subsequent prosecution." *Reid*, 77 A.3d at 585. The analysis of whether there is a duplication of legal issues should include whether a "commonality" of legal issues exists and should not be limited to merely comparing the charges. *Id.* at 585-86. However, "a mere *de minimis* duplication of factual and legal issues is insufficient to establish a logical relationship between offenses." *Com. v. Bracalielly,* 658 A.2d 755, 761 (Pa. 1995).

It is also important that a trial court be guided by the policy considerations that Section 110 was designed to serve, including "(1) to protect a person accused of crimes from governmental harassment of being forced to undergo successive trials for offenses stemming from the same criminal episode; and (2) as a matter of judicial administration and economy, to assure finality without unduly burdening the judicial process by repetitious litigation." *Reid*, 77 A.3d at 583.

The Commonwealth argues that there were two distinct "criminal episodes" which,

other than *de minimus* ones, contain no overlapping facts or issues. Specifically, the Commonwealth relies on the fact that the two events were investigated by separate law enforcement agencies and probable cause was established separately and asserts that any overlapping facts are de minimum and inconsequential to the analysis of whether the prosecution in both cases is based on the same facts.

The Commonwealth relies on *Bracalielly* case in support of its argument. In that case, the Supreme Court found that controlled drug buys using the same confidential informant and which occurred in Butler County and Allegheny County over the course of thirteen (13) days were not part of the same criminal episode. *Bracalielly,* 658 A.2d at 757-58 and 762. Specifically, the Court found that the critical determining factor was the "*independent* involvement of two distinct law enforcement entities [which conducted] *separate* undercover investigations [in that] no law enforcement officer from Allegheny County participated in the Butler County transactions" and vice versa. *Id.* at 762 (emphasis in original).

Defendant argues that the alleged conduct in both cases stem from the same criminal conduct and the same criminal episode. Specifically, Defendant states that the Pennsylvania State Police's "involvement began as a direct result of directives of Det. Caschera following the events of the subsequent prosecution [the controlled buy], and but for those directives the events of the former prosecution [the traffic stop and search] would not have occurred because PSP would not have been specifically following the black Mercedes looking for probable cause to pull it over."

It is undisputed here that a conviction occurred in the former prosecution when Defendant pled guilty to Possession of a Controlled Substance. It is also undisputed that both sets of charges were brought in the same judicial district – Lycoming County Court of Common Pleas. Regarding the third prong, the Court holds that the Commonwealth was aware of the charges in the instant case because the investigating authority, the Lycoming County NEU, is an extension of the District Attorney's Office. Detective Caschera testified that he intentionally delayed the filing of these charges in order to protect the identify of their CI. Clearly, the Commonwealth was in possession of the information needed to bring about the charges when Defendant pled guilty in the prior case. The primary dispute here is whether these two sets of charges arose from the same criminal episode. In considering the case law set forth above, the Court finds that they do.

It is true that, had the former case gone to trial, Trooper Jacobs would have been testifying on behalf of the Commonwealth and, in the present case, Detective Caschera and the CI would be testifying. However, this case is distinguishable from the *Bracalielly* case because Trooper Jacobs only became aware of the situation when he was informed by and received direction on how to proceed from Detective Caschera. Additionally, even before Trooper Jacobs began following Defendant's vehicle, Defendant was being "tailed" by another member of the NEU so that they would not lose track of him. In other words, the charges in the former prosecution brought by the PSP would not have been brought but for the NEU calling and informing them of the controlled buy that had just occurred and their suspicion that the Defendant had drugs in his vehicle. This cannot be considered independent involvement between the NEU and the Pennsylvania State Police.

Additionally, despite the Commonwealth's arguments, there are several overlapping facts between each case, creating a substantial duplication. These facts include:

1) the prerecorded buy money used by the CI in the instant prosecution was found in the vehicle by Trooper Jacobs in the former prosecution;

2) Defendant was seen driving the black Mercedes before and after allegedly selling the drugs and was later pulled over by Trooper Jacobs driving the same vehicle;

3) In the former prosecution, Defendant pled guilty to the possession of crack cocaine and in the instant prosecution, Defendant is alleged to have sold crack cocaine;

4) The co-Defendant is the same person in both cases;

5) The controlled buy and the traffic stop occurred within miles of one another, on the same day, and within mere minutes of one another.

In viewing the totality of the circumstances, it is clear that these two occurrences are a connected series off developments that are part of a larger series and therefore, constitute one criminal episode.

c. Constitutions

Aside from finding that the former and current prosecutions arise from the same criminal episode, and perhaps more importantly, the Court finds that allowing Defendant to undergo prosecution under these circumstances is inherently unconstitutional and unfair.

The Federal Double Jeopardy Clause applies to the States through the Fourteenth Amendment and is the "constitutional 'floor' . . . for purposes of Pennsylvania's counterpart provision." *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Com. v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991). Constitutional double jeopardy is "grounded on the concept that no person

'should be harassed by successive prosecutions for a single wrongful act and that no one should be punished more than once for the same offense.'" *Com. v. Johnson*, 231 A.3d 807, 819 (Pa. 2020) (internal citations omitted). While there is strong public policy favoring protecting the public from criminal conduct, "a trial court should consider dismissal of charges where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed. *Id.*, at 822, *citing Com. v. Burke*, 5781 A.2d 1136, 1144 (Pa. 2001).

In the instant case, at argument, the Commonwealth specifically stated that Defendant was provided discovery materials in the former prosecution that identified that the NEU had conducted a controlled buy before the traffic stop. The Commonwealth intended for this to prove that Defendant should have been aware that the current charges were forthcoming when he pled guilty to the possession charge. To the contrary, this would lead the Defendant to believe that his guilty plea would resolve any potential charges arising from the controlled buy as well. Therefore, it is reasonable that Defendant would have believed that all illegal activity that occurred on January 19, 2021 – both the controlled buy and resulting traffic stop – were being disposed of at the time of his plea.

The Court is of the opinion that this may be a different discussion if the Commonwealth would have brought the second set of charges against Defendant *prior* to him pleading guilty, but not after the case was disposed. Had Defendant known that separate charges were forthcoming, he may not have pled guilty or taken the Commonwealth's plea deal. Allowing Defendant to plead guilty when it is reasonable for him to believe that all charges from the same day were being disposed of violates basic tenants of fairness and due

process. This is not to say that the Commonwealth intentionally attempted to mislead the Defendant and it is reasonable to believe that the timing of the charges was the result of miscommunication or oversight. However, allowing Defendant to be prosecuted on the instant charges would be fundamentally unfair.

IV. Conclusion

For the forgoing reasons and specifically because the events that occurred on January 19, 2021 are part of the same criminal episode and allowing the Commonwealth to proceed on the current charges would be unconstitutional, the Defendant's Motion is granted.

ORDER

AND NOW, this **15th** day of **December**, **2021**, upon consideration of Defendant's Omnibus Pre-Trial Motions and for the reasons set forth above, the Motion is **GRANTED.** All charges in this case are dismissed.

By the Court,

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Ryan M. Tira, Judge

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